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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

US AIRWAYS, INC., a Delaware
corporation, *et al.*,

Plaintiff,

vs.

Don ADDINGTON; John BOSTIC;
Mark BURMAN; Afshin IRANPOUR;
Roger VELEZ; Steve WARGOCKI;
Michael J. SOHA; Rodney Albert
BRACKIN; and George MALIGA, on
behalf of themselves and the certified
WEST PILOT CLASS,

and

US AIRLINE PILOTS ASS'N, an
unincorporated association,

Defendants.

CASE NO. 2:10-cv-01570-PHX-ROS

**WEST PILOTS' REPLY IN
SUPPORT OF THEIR MOTION
FOR SUMMARY JUDGMENT,
DOC. 150.**

(Oral argument requested)

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Reply Memorandum of Points and Authorities

I. Issues

1. A union succeeds to the obligations of its predecessor when it is elected to represent the same bargaining unit. USAPA was elected to represent the same bargaining unit as had been represented by ALPA. USAPA, therefore, is the successor to ALPA's statutory and contract duties.

2. A union's freedom to contract does not lessen its obligation to abide by the duty of fair representation. *Ass'n of Flight Attendants v. USAir, Inc.* ("AFA") merely recognizes that a successor union is free to negotiate contract terms (with the consent of the carrier). *AFA* has no application here because it does not address the duty of fair representation.

3. The premise of the West Pilots' motion is that they have the right to have seniority integration conducted according to ALPA Merger Policy procedures. USAPA's Response fails to explain how that right was negated by the device of electing a different union. USAPA, therefore, fails to address the premise of the West Pilots' motion.

4. The West Pilots seek declaratory judgment that USAPA would violate their right to be fairly represented if it negotiates and implements a contract that dishonors the Nicolau arbitration. USAPA's Response argues, *inter alia*: (a) that the Nicolau Award is not part of the status quo; (b) that the East Pilot majority was entitled to elect USAPA; (c) that arbitrations are not binding on courts until confirmed; and (d) that it has not violated its RLA duty to make every reasonable effort to bargain. These arguments are immaterial to deciding the West Pilots' motion.

5. The facts that are material to the West Pilots' right to obtain relief are either fully supported by USAPA's Statement of Facts, Doc. 153, or are fully supported by evidence that is indisputable. USAPA either does not dispute

1 these facts or disputes them improperly. The Court should disregard USAPA's
2 improper responses to the West Pilots' facts.

3 **II. Legal Argument**

4 **A. USAPA is the successor to ALPA's statutory and** 5 **contract duties because it replaced ALPA as the** 6 **representative of the same bargaining unit.**

7 A union succeeds to the obligations of its predecessor when it is elected to
8 represent the same bargaining unit. USAPA was elected to represent the same
9 bargaining unit as had been represented by ALPA. USAPA, therefore, is the
10 successor to ALPA's statutory and contract duties.¹

11 **1. A union succeeds to the obligations of its predecessor** 12 **when it is elected to represent the same bargaining** 13 **unit.**

14 A union is the bargaining representative of an organized group of workers
15 referred to as a bargaining unit. The relationship of the union to this group of
16 workers is closely akin to an attorney's relationship to a client. It should be
17 self-evident that a bargaining unit can no more disregard its existing
18 obligations because it changed its union than it could do so because it changed
19 its legal counsel. Yet, USAPA makes such an argument here.

20 USAPA cites no authority that supports the proposition that, by replacing
21 its union, a bargaining unit can change its existing obligations. Rather,
22 substantial authority is directly to the contrary. *E.g., Intn'l Bhd. of Teamsters v.*
23 *Texas Int'l Airlines, Inc.*, 717 F.2d 157, 163 (5th Cir. 1983) ("If the employees
24 designate a new collective bargaining representative, it succeeds to the status
25 of the former representative without alteration in the contract terms."). Even,
26

27 ¹ The West Pilots fully concur with the arguments on successor status made
28 by US Airways, Doc. 164 at 3:4 to 6:16, and incorporate those arguments here
by reference.

1 AFA, the decision upon which USAPA relies so heavily, fully supports this
2 proposition, as shown here:

3 [I]t does not logically follow that a change in bargaining
4 representative necessarily entails a change in bargaining agreement.
5 Indeed, in *International Bhd. of Teamsters v. Texas Int'l Airlines*,
6 Judge Rubin noted in the course of his discussion: "If the employees
7 designate a new collective bargaining representative, it succeeds to
the status of the former representative without alteration in the
contract terms."

8 807 F. Supp. 827, 834 (D.D.C. 1992).

9 USAPA's argument, in essence, is that the majority's right to replace a
10 union trumps the union's duty of fair representation and that exercise of that
11 right can function to negate existing fair representation obligations. That
12 proposition directly conflicts with the notion that the duty of fair representation
13 exists to constrain the majority's power. *See Beck v. UFCW, Loc. 99*, 506 F.3d
14 874 (9th Cir. 2007) ("The duty of fair representation exists because a single
15 labor organization represents the interests of all employees within a unit, and if
16 individual employees are not to be deprived of all effective means of protecting
17 their own interests, it must be the duty of the representative organization to
18 serve the interests of all members [not just the majority].") As Judge Posner
19 explained in *Air Wisconsin Pilots Protection Com. v. Sanderson*, "[m]inority rights
20 imply a limitation on the rights of the majority." 909 F.2d 213, 216 (7th Cir.
21 1990). USAPA argues just the opposite.

22 This Court should hold, therefore, that the act of electing a new
23 bargaining representative does not have the effect argued by USAPA. A union
24 that is elected to represent the same bargaining unit succeeds to the
25 contractual obligations and statutory duties of its predecessor. No more, but no
26 less.

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1 **2. USAPA was elected to represent the same bargaining**
2 **unit as had been represented by ALPA.**

3 USAPA's argument, Doc. 160 at 8, that it was not a party to agreements
4 made by ALPA misses the point and is contradicted by legal positions taken by
5 USAPA elsewhere. In its pleadings in another action for example, USAPA
6 stated, "As the certified, exclusive bargaining representative of the now merged
7 US Airways pilots, USAPA, became a party to the East CBA and West CBA. . . ."
8 *U.S. Airline Pilots Ass'n, v. US Airways, Inc.*, Case 1:11-cv-02579-ARR-SMG,
9 (E.D.N.Y.) (Amended Compl., Doc. 12 at ¶ 22) (emphasis added). Plainly, where
10 it suits USAPA's purposes, it has no problem with the proposition that by
11 virtue of succeeding to ALPA as the bargaining representative it became a party
12 to ALPA's contracts with the airline. There is no question, therefore, that
13 USAPA succeeded ALPA and acquired the status of the nominal party
14 representing the same bargaining unit.

15 **3. USAPA is the successor to ALPA's statutory and**
16 **contract duties.**

17 It could not be clearer. USAPA succeeded ALPA as the representative of
18 this bargaining unit. To the extent that an RLA union is a "party" to collective
19 bargaining contracts, USAPA is a party to all contracts to which ALPA was a
20 party on behalf of this bargaining unit. This applies no less to the agreement
21 between the two pilot groups to arbitrate their seniority dispute. For all
22 purposes related to collective bargaining, the duty of fair representation and
23 other aspects of this litigation, therefore, USAPA is the successor to ALPA's
24 statutory and contract duties.

25 **B. AFA merely recognizes the general rule of freedom of**
26 **contracting.**

27 A union's freedom to contract does not lessen its obligation to abide by the
28 duty of fair representation. *AFA* merely recognizes that a successor union is

1 free to renegotiate contract terms (with the consent of the carrier). *AFA* has no
2 application here because it does not address the duty of fair representation.

3 **1. A union's freedom to contract does not lessen its**
4 **obligation to abide by the duty of fair representation.**

5 Freedom to contract is not absolute. Consequently, in the context of
6 collective bargaining, it is well recognized that a union's freedom to contract is
7 constrained by its statutory duties. *E.g.*, *HK Porter v. NLRB*, 397 U.S. 99, 108
8 (1970) (recognizing that "the parties' freedom of contract is not absolute under
9 the Act [NLRA]"). Indeed, the doctrine of fair representation was established for
10 this purpose. *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 203 (1944)
11 (holding that "the statutory power to represent a craft and to make contracts as
12 to wages, hours and working conditions does not include the authority to make
13 among members of the craft discriminations not based on . . . relevant
14 differences"). USAPA's freedom to contract, therefore, does not lessen its
15 obligation to abide by the duty of fair representation.

16 **2. AFA merely recognizes that a successor union can**
17 **renegotiate contracts (with the consent of the carrier).**

18 The dispute in *AFA* was whether a bargaining unit's CBA defined the
19 terms of the status quo when it merges into another. As an aside, the court
20 noted, whichever CBA defined the status quo, that the union could negotiate
21 different terms. Only taken out of context, does this seem to help USAPA. When
22 the D.C. Circuit affirmed it showed that this freedom to negotiate did not
23 invalidate existing obligations, explaining as a "general principle that collective
24 bargaining agreements survive a change in representative, at least for status
25 quo purposes." *Ass'n of Flight Attendants, AFL-CIO v. USAir, Inc.*, 24 F.3d 1432,
26 1439 (D.C. Cir. 1994). Neither the district court nor the D.C. Circuit, in *AFA*,
27 addressed the duty of fair representation. *AFA*, therefore, merely recognizes
28

1 that status quo doctrine does not limit a successor union's freedom to
2 negotiate.

3 **3. AFA has no application here because it does not**
4 **address the duty of fair representation.**

5 AFA merely addresses whether status quo doctrine limits a successor
6 union's freedom to renegotiate contract terms. It says nothing about the duty of
7 fair representation. It plainly has no application here.

8 **C. USAPA's Response fails to explain how the West Pilots'**
9 **right to have seniority integration conducted according**
10 **to ALPA Merger Policy procedures could be negated by**
11 **the device of electing a different union.**

12 The premise of the West Pilots' motion is that they have the right to have
13 seniority integration conducted according to ALPA Merger Policy procedures.
14 USAPA's Response fails to explain how that right was negated by the device of
15 electing a different union. USAPA, therefore, fails to address the premise of the
16 West Pilots' motion.

17 **1. The premise of the West Pilots' motion is that they**
18 **have a right to have seniority integration conducted**
19 **according to ALPA Merger Policy procedures.**

20 The premise of the West Pilots' motion is that they have the right to have
21 seniority integration conducted according to ALPA Merger Policy procedures.
22 *Bernard v. Air Line Pilots Ass'n, Int'l*, 873 F.2d 213, 217 (9th Cir. 1989), stands
23 for the proposition that the Jet America pilots had such a right in their merger.
24 See Doc. 160 at 11:10 to 11:16 (USAPA conceding this point). The West Pilots
25 have an even stronger right than the Jet America pilots because, in this
26 instance, the right arises not only from internal union governance but from the
27 Transition Agreement and the Chapter 11 confirmed plan. See Doc. 150 at 9:6
28 to 9:14 (West Pilots making this argument).

1 **2. USAPA’s Response fails to explain how that right was**
2 **negated by the device of electing a different union.**

3 In its Response, USAPA’s argument focuses exclusively on the union’s
4 duty and ignores the West Pilots’ rights. Both, however, must be considered
5 because each defines the scope of the other. A worker’s right to fair
6 representation, in other words, is inseparable from a union’s duty to represent
7 that worker fairly. *See Harrison v. United Transp. Union*, 530 F.2d 558, 564 (4th
8 Cir. 1975) (referring to “a right shared by all members of his union: the right to
9 fair representation of each individual’s claims against the employer”);
10 *Augsburger v. Bhd. of Locomotive Engineers*, 510 F.2d 853, 857 (8th Cir. 1975).
11 (“The right to fair representation by the bargaining agent is a right which the
12 judiciary has created by implication from federal statutes.”). USAPA fails to
13 explain—and we can think of no reasonable explanation—how the East Pilot
14 majority could legally use USAPA’s ouster of ALPA as a device to negate the
15 West Pilots’ right to have seniority integration conducted according to ALPA
16 Merger Policy procedures.

17 **3. USAPA fails to address the premise of the West Pilots’**
18 **motion.**

19 USAPA should gain nothing from arguing that the East Pilots were
20 “entitled to replace ALPA.” Doc. 160 at 7:9 to 8:10. Entitled or not, replacing
21 ALPA did not change that each West Pilot has a right to be fairly represented by
22 his union. USAPA does not explain how replacing ALPA negated that right,
23 specifically the right to have the union honor the Nicolau arbitration. USAPA,
24 therefore, fails to address the central argument of the West Pilots’ motion.

25 **D. USAPA’s Response makes arguments immaterial to**
26 **deciding the West Pilots’ summary judgment motion.**

27 The West Pilots seek declaratory judgment that USAPA would violate their
28 right to be fairly represented if USAPA were to negotiate and implement a

1 contract that dishonors the Nicolau arbitration. Doc. 150 at 15:13 to 15:15.
2 USAPA's Response argues, *inter alia*: (a) that the Nicolau Award is not part of
3 the status quo; (b) that the East Pilot majority was entitled to elect USAPA; (c)
4 that arbitrations are not binding on courts until confirmed; and (d) that it has
5 not violated its RLA duty to make every reasonable effort to bargain. These
6 arguments are immaterial to deciding the West Pilots' motion.

7 **1. The West Pilots seek declaratory judgment that USAPA**
8 **would violate their right to be fairly represented if it**
9 **negotiates and implements a contract that dishonors**
10 **the Nicolau arbitration.**

11 The West Pilots make a straightforward claim. They argue that they have
12 the right to have the Nicolau arbitration honored as the final resolution of the
13 seniority integration dispute. *See* Doc. 150 at 10:4 to 11:16. They argue that
14 this right would be violated if USAPA negotiates and implements a contract
15 that dishonors the Nicolau arbitration, unless it has an objectively legitimate
16 union purpose for doing so. *Id.* at 11:13 to 11:16 ("As a matter of law,
17 therefore, a union (such as USAPA) must have an objectively legitimate
18 purpose—something other than a desire to satisfy the majority—to dishonor a
19 final resolution of a seniority dispute (such as the Nicolau arbitration).

20 **2. USAPA's Response argues, *inter alia*: (a) that the**
21 **Nicolau Award is not part of the status quo; (b) that the**
22 **East Pilot majority was entitled to elect USAPA; (c) that**
23 **arbitrations are not binding on courts until confirmed;**
24 **and (d) that it has not violated its RLA duty to make**
25 **every reasonable effort to bargain.**

26 USAPA's Response makes arguments that have no bearing on deciding the
27 West Pilots' motion. It argues, for example, that the Nicolau Award is not part
28 of the status quo. Doc. 160 at 4:19 to 6:8. The West Pilots, however, do not
argue otherwise. They used the phrase "status quo" in their motion only to
explain the dispute in *AFA*. Doc. 150 at 7:1 to 7:3.

1 USAPA argues that the East Pilot majority was “entitled” to elect USAPA
2 because it was dissatisfied with the Nicolau Award. Doc. 160 at 7:9 to 7:10
3 (“Whatever the reasons, the pilots voted to oust ALPA and replace it with
4 USAPA, which they were clearly entitled to do under the RLA.”). Again, the
5 West Pilots do not argue otherwise here. It is true that it is wrongful for a union
6 to “win[] an election by a promise of preferential representation to the
7 numerically larger number of voters.” *Truck Drivers, Local Union 568 v. NLRB*,
8 379 F.2d 137, 143 (D.C. Cir. 1967). But the West Pilots do not make that
9 argument here.

10 USAPA argues that the Nicolau Award is not *res judicata*. Doc. 160 at
11 13:15 to 16:12. Again, the West Pilots do not argue otherwise. Rather, they
12 argue that the “validity” of the Nicolau Award is *res judicata*. Doc. 150 at 11:17
13 to 11:25. This establishes that it is too late for USAPA to collaterally attack the
14 arbitration.

15 Finally, USAPA argues that it is not in violation of its RLA duty to make
16 every reasonable effort to bargain with the Airline. Doc. 160 at 17:2 to 17:15.
17 Here too, the West Pilots do not argue otherwise.

18 **3. USAPA’s Response makes arguments that are**
19 **immaterial to deciding the West Pilots’ motion.**

20 Two issues are material to deciding the West Pilots’ summary judgment
21 motion: (1) whether USAPA must have a legitimate purpose to implement a
22 contract that dishonors the Nicolau arbitration; and (2) whether USAPA would
23 have such a purpose. None of USAPA’s arguments addressed in this section are
24 material to deciding those issues.

25 **E. USAPA does not properly dispute any fact material to**
26 **deciding the West Pilots’ summary judgment motion.**

27 The facts that are material to the West Pilots’ right to obtain relief are
28 either fully supported by USAPA’s Statement of Facts, Doc. 153, or are fully

1 supported by evidence that is indisputable. USAPA either does not dispute
2 these facts or disputes them improperly. The Court should disregard USAPA's
3 improper responses to the West Pilots' facts.

4 **1. The facts that are material to the West Pilots' right to**
5 **obtain relief are either fully supported by USAPA's**
6 **Statement of Facts, Doc. 153, or are fully supported by**
7 **evidence that is indisputable.**

8 To illustrate that there are no genuine disputes of material fact, the West
9 Pilots' *Response to USAPA's Motion for Summary Judgment*, Doc. 158, largely
10 uses USAPA's Statement of Facts, Doc. 153, to support the facts needed to
11 grant relief on the West Pilots' Motion. Doc. 158 at 1:20 to 3:10. Nearly all such
12 facts can be fully supported this way. *See* Doc. 153 at ¶¶ 1, 8-10, 14-17, 21,
13 23, 27, 32, 33, 38. Those few facts that require support from the West Pilots'
14 Statement of Facts are entirely objective and cannot be (and are not) properly
15 disputed by USAPA. *See, e.g.*, Doc. 151 at ¶¶ 1, 3 (explaining that the Chapter
16 11 plan directed the parties to implement the merger); *id.* at ¶¶ 18-19
17 (explaining the stated purpose of an ALPA Merger Policy arbitration); *id.* at
18 ¶¶ 36-38 (providing the language used by ALPA to order the East MEC to
19 implement the Nicolau Award); *id.* at 65-70 (objective information on USAPA's
20 seniority proposal that is not strictly material to the West Pilots' motion).

21 **2. USAPA either does not dispute these facts or disputes**
22 **them improperly.**

23 The local rules allow USAPA to file a Controverting Statement of Facts that
24 disputes a fact by so stating and making "a reference to the specific admissible
25 portion of the record supporting" its position. L.R.Civ. 56.1(b). The Rules,
26 however, do not provide USAPA an opportunity to make lengthy legal argument
27 in its Controverting Statement of Facts:

28 The Rule requires the controverting party to provide a specific record
reference supporting the party's position if a fact is disputed; it does
not permit explanation and argument supporting the party's position

1 to be included in the response to the moving party's statement of
 2 facts. Argument may be made in the response or reply brief on the
 3 motion for summary judgment, but within the page limits. [T]he
 4 Court therefore will disregard each of those paragraphs except for the
 word "Controverted" and the references to the record.

5 *Pruett v. Ariz.*, 606 F. Supp. 2d 1065, 1071 (D. Ariz. 2009).

6 In its Controverting Statement of Facts, Doc. 161, USAPA makes lengthy
 7 and improper arguments (some running as long as 14 lines), offers factual
 8 evidence that does not directly dispute the facts at issue, and/or moves to
 9 strike. *E.g.*, doc. 161 at ¶¶ 2, 3, 7, 12, 14, 31, 34, 36-61, 66-70, 73. This all
 10 violates the Local Rule.²

11 **3. The Court should disregard USAPA's improper**
 12 **responses to the West Pilots' facts.**

13 As in *Pruett*, 606 F. Supp. 2d at 1071, the Court should disregard the
 14 paragraphs identified above from USAPA's Controverting Statement of Facts
 15 because they flagrantly fail to comport with the requirements of L.R.Civ.
 16 56.1(b).

17 **III. Conclusion**

18 The West Pilots' respectfully ask the Court to grant their Motion for
 19 Summary Judgment, Doc. 150.

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 24 ² In its Response, under the guise of disputing facts, USAPA argues that the
 25 West Pilots lack facts that could prove arbitrariness. USAPA cites *Airline Pilots*
 26 *Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991), for the proposition that a plaintiff
 27 "must show" arbitrariness to prove a fair representation claim. Doc. 160 at
 28 21:13 to 21:17. But that is not true. Rather, *O'Neill* merely recognizes
 arbitrariness as an alternative basis to find violation of the duty of fair
 representation. *Id.* at 71 ("A union breaches the duty if its conduct is arbitrary,
 discriminatory, or in bad faith."). It is immaterial, therefore, that the West
 Pilots do not try to prove arbitrariness.

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Dated this 19th day of March, 2012.

POLSINELLI SHUGHART, PC

/s/ Andrew S. Jacob

By _____

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Certificate of Service

I hereby certify that on this 19th day of March 2012, I electronically transmitted the foregoing document to the U.S. District Court Clerk’s Office by using the ECF System for filing and transmittal.

/s/Andrew S. Jacob

By _____